[Cite as *State Dept. of Natural Resources, Div. of Forestry v. Srofe*, 2024-Ohio-1842.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE of OHIO, DEPARTMENT of NATURAL RESOURCES, DIVISION of FORESTRY,	:	Case No. 22CA3996
Plaintiff-Appellee,	:	
v.	:	DECISION AND JUDGMENT ENTRY
DANNY DARRELL SROFE, Jr., et al.,	:	
Defendant-Appellant.	:	**RELEASED: 05/07/2024**

APPEARANCES:

Edward L. Littlejohn, Jr., and Jeffrey D. Menoski, Wintersville, Ohio, for appellant.

Dave Yost, Ohio Attorney General, Assistant Attorney Generals Daniel J. Martin and Joseph Wambaugh, of the Environmental Enforcement Section, Columbus, Ohio, for appellee.

Wilkin, J.

{¶1} Appellant, Danny Darrell Srofe, Jr.,[1] appeals the Scioto County Court of Common Pleas judgment entry granting the state of Ohio, Department of Natural Resources, Division of Forestry (hereinafter "DNR") quiet title to property that borders Srofe's property. DNR filed the quiet title complaint in response to previous litigation filed by Srofe for adverse possession of the same property at issue here. Srofe's prior litigation did not name DNR as a party and he was granted default judgment in 2019 after Henry Wagner and his devisees/successors did not file an answer to Srofe's complaint for adverse possession of approximately 12 acres.

[1] Srofe is the only defendant appealing the trial court's decision.

{¶2} Srofe in his single assignment of error challenges the trial court's decision in which it found DNR's survey expert credible and that the boundary line agreement and other deeds supported DNR's position that it was the owner of the property. According to Srofe, the standard of review is de novo since the trial court relied on a contractual document and deeds. But that alternatively, the standard is manifest weight of the evidence. DNR maintains the standard of review is manifest weight of the evidence since the trial court's decision was based on factual findings.

{¶3} We find that the evaluation of the credibility of DNR's survey expert and Srofe's survey expert is pursuant to the manifest weight of the evidence standard. We, however, review de novo the admitted exhibits including the boundary line agreement that was signed by Srofe's predecessor and binding on him, as well as the recorded deeds giving DNR ownership of the surrounding properties. Based on the testimony and admitted documents, we find that there is competent credible evidence supporting the trial court's decision. Srofe's sole assignment of error is overruled and the trial court's judgment entry is affirmed.

PROCEDURAL BACKGROUND AND FACTS

{¶4} On May 4, 2020, DNR filed a complaint to quiet title and declaratory judgment requesting it be granted ownership of the property north of Srofe's 1.2-acre property. DNR initiated its case after DNR's forest manager became aware that Srofe was granted default judgment finding him the owner of approximately 12 acres in Shawnee State Forest. This approximate 12 acres borders Srofe's property to the north and is the property in contention here.

{¶5} In the complaint, DNR asserted that it had owned this particular property for decades. During that time, the property has been open for public use as a forestry. Srofe responded to DNR's complaint and both filed motions for summary judgment. The trial court denied both motions and the matter proceeded to a bench trial on June 23, 2022.

{¶6} Prior to the start of testimony, DNR argued that the trial court has the inherent power to vacate the 2019 judgment in favor of Srofe as the owner of property for lack of jurisdiction. The basis is that Srofe failed to serve DNR as a necessary party. Accordingly, DNR maintained that the 2019 judgment does not have any bearing on the current proceedings and that the trial court could find in favor of DNR here. Srofe's attorney agreed that the "issue for trial today as (sic.) who owns what and who owns where. And I think that's to be decided through this court." Srofe's attorney, however, disagreed with the trial court's authority to take action in Srofe's previous proceedings under DNR's 2020 case number. Srofe's attorney claimed res judicata applied because the state does not have any claim to the property granted to Srofe in the 2019 judgment entry.

{¶7} DNR disagreed with Srofe's counsel's argument that it should have filed a motion to vacate pursuant to Civ.R. 60(B) since DNR was not a party in the previous litigation. DNR reiterated the trial court's inherent power to vacate a void judgment, which the 2019 judgment granting Srofe ownership of the approximate 12 acres is. Srofe conceded that the 2019 judgment erroneously included granting Srofe ownership of Virginia Military Survey ("VMS") 13-521 which he requested. This is because VMS 13-521 is owned by DNR. Thus, the

issue at trial was the ownership of the approximate 12 acres in VMS 14-178 that borders Srofe's property in the north. The trial court took the arguments under advisement and the trial began.

{¶8} The first witness was Charles Egbert, forest manager at Shawnee State Forest. Egbert has been in the manager position since 2012, and prior to that he was the land management forester there. Egbert testified that the state of Ohio owns Shawnee State Forest but that DNR operates the state park. In his current position, he is responsible for the overall maintenance of the property and facilities, as well as the growth/harvest of timber resources, wild life habitat, and public recreation. There are eight staff members that he supervises and the majority are equipment operators and one is a land management forester.

{¶9} Egbert is acquainted with Srofe and had several interactions with him. Srofe lives east off of Shawnee road and is surrounded by Shawnee State Forest. Egbert explained that for just a couple of years, the area to the west of Shawnee road has been mowed and a garden was planted in 2019. But prior to that, DNR maintained the mowing and kept the brushing clear to the west of Shawnee road and also the area south of Srofe's property, in which Egbert believed DNR owned. Although Egbert noticed the garden, he did not see anyone plant or maintain the garden, but once he noticed muddy tractor tracks from an area south of Srofe's property to the garden.

{¶10} Egbert also testified that DNR maintained the forest area north of Srofe's property. DNR has been maintaining that area since he began working there in 2010, and keeping the property open to the public. As far as Egbert

knows, Srofe did not object to the public using the property and that he is unaware of Srofe talking to any staff member about public access to the property. Srofe, however, in 2018 discussed a fallen tree that was a hazard to his house and requested that DNR cut down the tree, which was located just east of Srofe's barn (garage). Srofe also stopped at the forestry department headquarters and spoke with the land management forester in which Srofe asked for survey information regarding a 12-acre plot north of his property. The information was not available. Another interaction Egbert had with Srofe was back in 2020, when the two were discussing boundary markers at the east and west of his property.

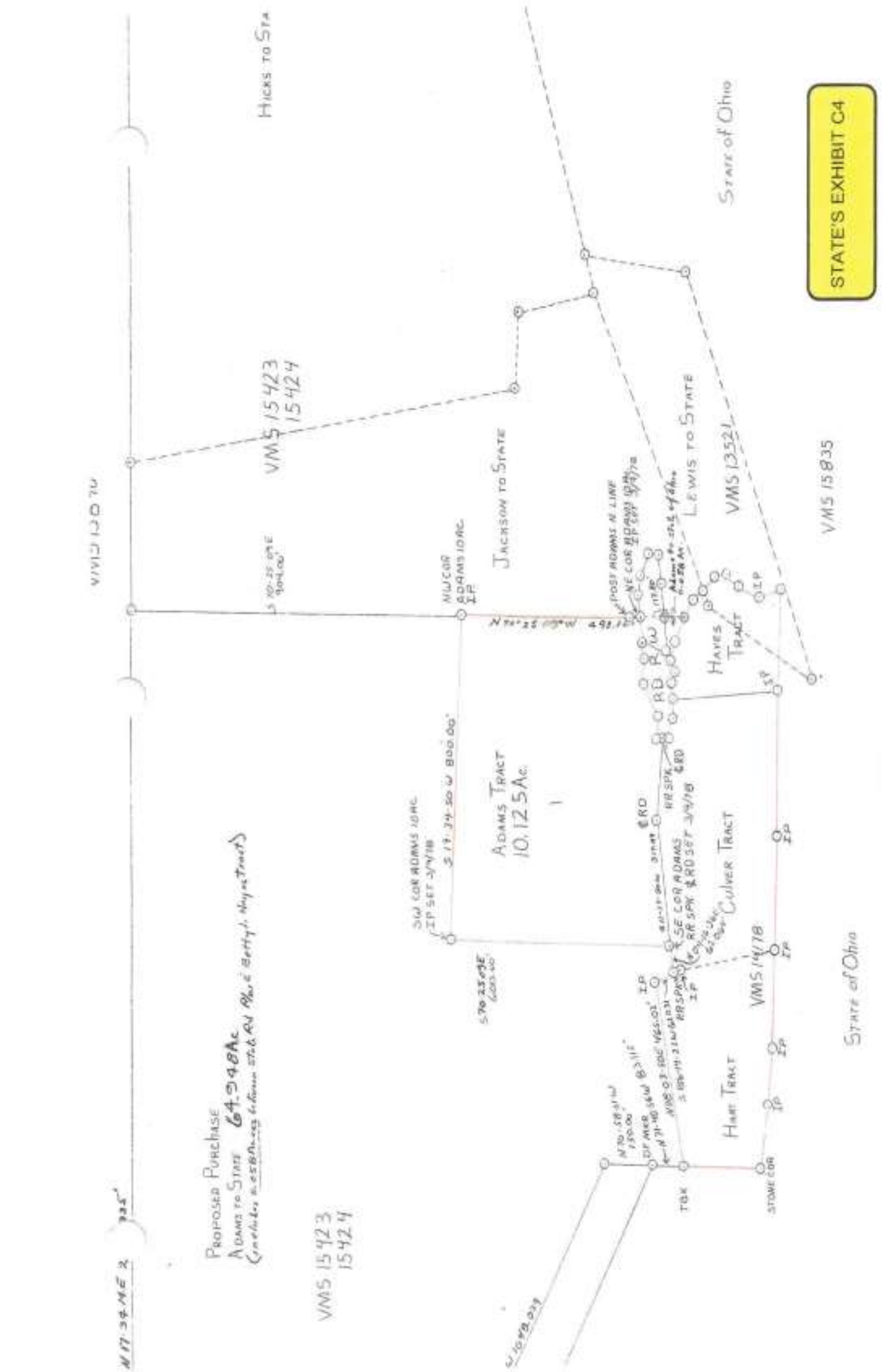
{¶11} DNR's next witness was Bryan Smith who works as a survey manager at the real estate land management section of DNR. Smith has been working there for over ten years. As part of his employment, Smith is "responsible for servicing all divisions of ODNR for boundary surveying services, control networks, any surveying related issues, generally, but primary focus is on boundary."

{¶12} Smith is a member of the professional land surveyors of Ohio and was recognized as an expert in the area of land surveying in court. He became involved in this case after his predecessor was contacted by the forestry division to evaluate land ownership at Shawnee State Forest. Smith took on the assignment and went out to the field, checked any internal documents, and commenced research at the courthouse engineer's office and the Ohio History Connection. Smith explained:

> First thing I started off was; one, researching the VMS, trying to figure out how the puzzle pieces fit together. Whenever you're

> doing a boundary survey the best way to describe it is a lot of times is trying to put a jigsaw puzzle together where all the pieces don't necessarily match. So, what we have to do is when they don't match use practices and procedures in order to go through and make those determination of how everything fits and where they actually are located on the ground. Looking at VMS's in this area there was a lot of ambiguity and the one to the west had a very large closer error. There was potential that the sizing acreages on those were incorrect. But in the course of doing that I was also able to see how over the years DNR had been discussing with the owners in the area and purchasing of property and then finally entering into boundary line agreements in order to try to get some closer on all that so if there was any ambiguity trying to wrap all that up and putting some finality to it. In the course of doing that I held the boundary line agreements and the other sales that were in the area and made my determination as to where the boundary was.

{¶13} Smith continued by explaining all the deeds and the several boundary line agreements he reviewed as part of his survey research, including boundary line agreements between DNR and Hayes, Culver and Hart. Another document reviewed by Smith was DNR's Exhibit C4, a "proposed purchase" illustration compiled by the state's real estate office preparing to purchase a large portion of property west of what is currently Srofe's property. This is the Adams tract to the West of Srofe's property which also included a 0.058-acre tract between the State road right of way and Hayes property which is now owned by Srofe. This exhibit included a map that demonstrates that VMS 13-521 extends to Srofe's property. The exhibit also demonstrates the other surrounding properties DNR purchased.


STATE'S EXHIBIT C4
Proposed Purchase
Adams to State 64.998Ac
VMS 15423
15424
Hicks to State
Jackson to State
Lewis to State
Adams Tract
10.125Ac.
Culver Tract
Hart Tract
Hayes Tract
VMS 15835
VMS 13521
VMS 14178
State of Ohio
State of Ohio

{¶14} Similarly, DNR's Exhibit C5 is an auditor's deed explaining that VMS 14-178 contains 9 acres and that VMS 13-521 is 6 acres. Another DNR exhibit Smith testified to was Exhibit C8 which outlines the boundary of the 0.75 acres that DNR purchased decades ago. Smith focused greatly on DNR's Exhibit C13, which is the boundary line agreement between DNR and Srofe's predecessor, Hayes. The boundary line agreement was filed at the county recorder's office and was incorporated as binding in Srofe's deed. Smith testified that the boundary line agreement demonstrates that the prior owner of Srofe's property "was recognizing that the State of Ohio had an ownership adjoining her in that area, and was wishing to get that boundary line in a certain location." According to Smith, the boundary line agreements are good mechanisms to eliminate property boundary disputes.

{¶15} Smith testified that in his professional opinion, he does not "believe the land records support an unassigned 12-acre parcel. That would be a 12 acre parcel out of an original 9-acre parcel that had (inaudible) conveyances to it, being northerly, easterly, or westerly of the Hayes 1.2-acre parcel now owned by Srofe." Smith continued that he does not agree with Srofe's survey expert Terrence Gilbert Smith's ("T.G. Smith") conclusion that there is a residual of approximately 12 acres that Srofe now adversely possesses. Smith testified that T.G. Smith's findings are not supported by the documents or survey standards. Further, Smith had an issue with T.G. Smith's failure to acknowledge the boundary line agreement that is binding on Srofe and demonstrates that DNR and Srofe have common boundaries.

{¶16} During cross-examination, Smith stated that he could not definitively indicate the exact location of VMS 14-178**.** Smith reiterated, however, that DNR had several boundary line agreements within the surveyed property. The trial court questioned Smith regarding several exhibits and in particular Exhibit J, which is a deed with a description of 163 acres in Shawnee State Forest in which it describes common trees between the old VMS surveys. This Smith testified demonstrates there should be no gap between the property lines, which is contradictory to T.G. Smith's survey of a 400-foot gap between properties. Moreover, he clarified that VMS surveys may result in a gap but that usually does not occur on a tract as small as the one at issue here.

{¶17} DNR rested at the conclusion of Smith's testimony and Srofe took the stand and testified on his own behalf. Srofe purchased the property in 2010 and in 2018, he filed his quiet title action against Henry Wagner, his family, and any heirs. He filed his complaint in order to acquire possession of any residual property from VMS 14-178 that was not sold when Henry Wagner decades ago began selling off his land in increments. Prior to filing his complaint, Srofe hired surveyor Ty Pell. According to Srofe, Ty Pell did not survey the property north of his property. T.G. Smith was commissioned by Srofe in 2020 to survey the northbound boundary of his property.

{¶18} Srofe clarified that when he filed his complaint he did not intend to include VMS 13-521 and that he had no intention to adversely possess any property owned by DNR. This is why Srofe only named the Wagners as parties. During cross-examination, Srofe acknowledged that his deed contains language

that he was bound by the boundary line agreement signed by his predecessor, Hayes. Srofe continued and elaborated that he initially did not question the boundary line agreement, but it was brought to his attention that the agreement included the wrong parties as sharing the southern point. Additionally, on cross-examination, Srofe admitted that DNR was bush-hogging the land north of his property. Srofe admitted that he was aware that DNR has property bordering his but nonetheless he did not serve them with his 2018 complaint or even inform them of the legal proceedings. Srofe instead waited until after he received judgment and then sent an e-mail to the forestry division. Finally, Srofe admitted that his attorney commissioned a title company which informed Srofe that VMS 14-178 originally had nine acres and as part of Srofe's chain of title, he was bound by the boundary line agreement. Further, that the title company did not inform him of any residual property from VMS 14-178 that is north of Srofe's property.

{¶19} DNR also questioned Srofe about retaining T.G. Smith as a surveyor in 2020. Srofe paid T.G. Smith thousands of dollars and T.G. Smith submitted multiple survey drafts to Srofe before Srofe forwarded the final version to his attorney.

{¶20} Srofe's final witness was surveyor expert T.G. Smith. Srofe reached out to T.G. Smith to assist with surveying property DNR was claiming ownership to. T.G. accepted the assignment and went to the location and testified that

> originally the survey that was done by Mr. Queen and the State of Ohio, they indicated that they put concrete markers in the ground. However, once we went out there we determined they probably didn't do it for one simple reason, that particular hillside area is loaded with

> stones. I'm talking from three inches, five inches, six, ten, 12, which would make it extremely difficult for anyone to dig and put them in. So, we found no monuments, with the exception of we did find monuments laying on the ground, but they were never put in the ground. There was another survey in that that was owned by the State of Ohio of a three-quarter acre tract that sits in[.]

{¶21} T.G. Smith continued that he

> actually sat the point for the 47 acre tract with five-eighths inch rebar's. Of course that was difficult to do because of the stones. We also sat the monuments around the State of Ohio's three-quarters of an acre tract. Then we went across the road and - - here in purple right there, survey number 13-521, we actually went in and found monuments. And we found a concrete monument right there. That concrete monument is a State monument. Now you can't read the top of it saying State of Ohio, but we've done enough surveys in this area that their concrete monuments always have two rebar in it, and if you looked at it, there's two rebar's sticking out of it and we know it's a State monument. Why it's there, we couldn't figure out, but we took a hunch and we went from there over to here and we found another monument right there. And when we did that, we suddenly started coming up with this is fitting a six acre tract. So, we went back to the top to the north and we found that pipe right there. Then we went over and my men set a P-K nail in the road. The purpose for that was to establish where that six acre tract is. For some reason the State of Ohio has that tract through a purchase and I think that everybody seems to think that that tract right there sits down here. It does not. It sits right there. There's no way that we came up that close with those monuments.
>
> Now, I will say this, the original survey of that tract doesn't call for a concrete monument. It doesn't call for a pipe. But in my business we take the best found evidence available.

{¶22} T.G. Smith acknowledged that his conclusion results in a gap between the properties, but explained that is common when dealing with VMS surveys, which are the worst in ascertaining boundaries. He also had an issue with the boundary line agreement between DNR and Hayes because according to him, DNR's six-acre tract does not border Srofe's property.

{¶23} DNR recalled Smith as a rebuttal witness. During his rebuttal testimony, Smith again highlighted the errors in T.G. Smith's assessment of the boundary lines and T.G. Smith's failure to consider the boundary line agreements.

{¶24} At the conclusion of Smith's rebuttal testimony, the trial court requested that each party submit their closing arguments in writing and that a judgment would be forthcoming. On August 8, 2022, the trial court filed its seven-page entry finding in favor of DNR. The trial court outlined the history of the dispute between the parties and additionally, the exhibits and documents it relied on in reaching its conclusion:

> The origin of this dispute began in July 1948 when H.W. and Marian Davies Wagner (hereinafter 'Wagner') purchased two (2) tracts of real property at the Scioto County Auditor forfeited land sale. (Plaintiff's Exhibit C-5). This conveyance was recorded in Scioto County Deed Records (hereinafter 'SCDR') Volume 363, Page 543. Both tracts were situated in Nile Township, Scioto County, State of Ohio. One tract was Virginia Military Survey #13521, being six acres, more or less. The other tract was VMS# 14178, being nine acres, more or less. The Wagner's also obtained title to 32.36 acres in adjoining VMS#15423/15424 in 1950. (Plaintiff's Exhibit C-7). The Wagner's then began selling off out conveyances from these tracts. The Wagner's conveyed all interest in VMS #13521 to Roy E. and Helen Lewis in 1975. In 1978 Roy and Helen Lewis conveyed all interest in VMS #13521 to ODNR. Plaintiff has owned all of VMS13521 since 1978, with the exception of any portion of the tract that may have been conveyed to Betty Hayes pursuant to the boundary line agreement described below.
>
> Wagner's made the following out conveyances from VMS #14178:
>
> 1950 1.2 acres to Clara H. Fisher SCDR Vol. 374, Pg. 568 Plaintiff's Exhibit C-11
>
> 1968 .75 acres to Ethel Thompson SCDR Vol. 585, Pg. 509 Plaintiff's Exhibit C-9
>
> 1974 .812 acres to Ted Shanks SCDR Vol. 663, Pg. 268 Plaintiff's Exhibit L

> Also referenced in Plaintiff's Exhibit L are additional out conveyances.
> .6 acres, .64 acres, 1.3 acres, to Hart SCDR Vol. 611, Pg. 52
> .67 acres to Hart SCDR Vol. 653, Pg. 87
> 1.96 acres, 2 acres to Culver SCDR Vol. 659, Pg. 13
>
> Srofe would end up the titled owner of the 1.2-acre tract. ODNR would end up the owner of the .75- and .812-acre tracts, to the West and North of the Srofe tract. The Culver and Hart tracts are to the south of the Srofe tract, and not directly involved in this litigation.
>
> In 1978, in an effort to resolve the uncertain line north of the 1.2 acre tract ODNR and Betty J. Hayes, Srofe's predecessor in title entered into a boundary line agreement, recorded in Vol. 5, Pg. 425, Scioto County Record of Agreements.

{¶25} The trial court, as trier of fact, then evaluated each expert and its determination in concluding that DNR's expert's opinion was consistent with the admitted documents:

> In this matter two different surveyors have attempted to locate monuments associated with VMS #14178 and to determine the location of the out conveyances from that survey by the Wagner's to determine if they owned a remainder interest, and if so, whether there was a remainder of real property to the north of the Srofe tract which would conflict with the ownership claims of ODNR. This is in the context of the original Virginia Military Surveys, which were notoriously inaccurate. Surveyor for Plaintiff has primarily relied upon natural boundaries and adjoining property references in forming his opinion as to the location of the property and VMS lines. Defendant's surveyor relied primarily upon concrete markers found buried or lying on the surface to form his opinion as to the location of the lines. These concrete markers, however, did not contain the bronze disc identifying them as state survey markers, but were like those markers used by ODNR. Several of these markers are not referenced in the deeds, or surveys, for these properties, and as such some are not considered monuments.
>
> The use of natural boundaries as a monument is of particular importance to this case. In the deed from Wagner's to Shanks, Wagner's conveyed the remainder of their 9-acre tract that was situate west of the center line of Hobey Creek Road to a stone bridge and then in a northeasterly line along the center line of Harberts Fork Creek to the Harris line. (Plaintiff Exhibit L). Hobey Creek Road and Harberts Fork Creek make up the West and North portion of the

Hayes/Srofe, original 1.2 acre tract. (See Plaintiff's Exhibit L, C-2, C-3). This matches the northwesterly portion of the Hayes/ODNR boundary line agreement. The Harris property would ultimately be sold to Ted Shanks and then to ODNR. This description would convey all property owned north and west of the 1.2 acre tract to Shanks. This description would also show the intent of Wagner's to transfer all property north and west of Harberts Fork Creek and south of the Harris tract to Shank. The intention of Wagner's as to what property they intended to convey is of utmost importance in determining a boundary line.

Defendant's surveyor did find several concrete markers located in the area. Specifically, he found several concrete markers, rebar and pipes set, or lying on rocky ground. This was a large part of his basis in placing the lines as submitted. However, none of these have identification caps on them and nothing to indicate how they arrived at these locations. In some ways they are inconsistent with the deeds offered as evidence in this matter. In particular, the location of concrete markers around the ¾ acre Harris tracts described above is not consistent with the original description of the tract from two concrete markers with four parallel sides in a rectangular shape. Defendant's survey would have this be a five-sided tract and a great distance from Harbert Fork Creek, which suggests these markers found by Defendant's survey are not for the ¾ acres Harris tract and are spurious. This Court finds from all of the evidence submitted, including the correspondence admitted, that Wagner's did not intend to retain any property north of the 1.2 acre tract.

Therefore, this Court finds that Plaintiff State of Ohio, Department of Natural Resources, Division of Forestry is the rightful and lawful owner of all lands contained in V.M.S. # 13521 as against Defendant Danny Darrell Srofe, Jr., and all others who would claim title under him, except as to any potion (sic.) south of the boundary line established by the Betty Hayes boundary line agreement.

This Court also finds that Plaintiff State of Ohio, Department of Natural Resources, Division of Forestry, is the rightful and lawful owner of those lands north and west of the Hayes-ODNR boundary agreement. This Court also finds that the Hayes-ODNR boundary line agreement dated November 9, 1978 recorded in Vol. 5, Pg. 425 Scioto County Record of Agreements is the boundary line between Plaintiff State of Ohio, Department of Natural Resources, Division of Forestry and Defendant Danny Darrell Srofe, Jr.

This Court further finds that Plaintiff State of Ohio, Department of Natural Resources, Division of Forestry was not served with the pleadings and summons in case number 18-CIH-226, that defendant had actual and constructive notice of the Plaintiff's interest. This Court further finds that publication was not sufficient to provide

> Plaintiff with reasonable notice of the action. This Court finds given the findings above, this Court's order dated March 5, 2019 and filed in case number 18-CIH-226, is vacated and held for naught, as to any portion of the real property described as being north or west of the Betty Hayes boundary line agreement referenced above.
>
> Wherefore, it is the order of this Court that the interest of in the real property described above is quieted in favor of Plaintiff as against the claims of defendant.

{¶26} It is from this judgment entry that Srofe appeals.

ASSIGNMENT OF ERROR

THE TRIAL COURT'S DECISION WAS NOT SUPPORTED BY CREDIBLE EVIDENCE AND WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶27} Srofe in his sole assignment of error presents several arguments and two alternative standards of review for us to apply. Initially, Srofe argues we should review the trial court's decision de novo, but alternatively under the manifest weight of the evidence. Srofe maintains that the trial court's decision relied on the boundary line agreement and several deeds, which are contractual documents that we should review de novo. And upon review, we should hold that the boundary line agreement is unenforceable because none of the deeds grant DNR ownership of property that is adjoining to the north of Srofe's property. To the contrary, Srofe's expert and the Scioto County Tax Map establish that "Srofe's 1.2 acre parcel is at the bottom of VMS 14178 and not adjoined or connected to MVS 13521, and that only the southwest corner of VMS 13-521 and the northeast corner of MVS 14178 are common."

{¶28} Srofe contends that DNR's alternative assertion that the 0.75 acres it acquired from Jackson establishes the common border with Srofe's property in the north is against the manifest weight of the evidence. DNR's assertion was

refuted by Srofe's expert T.G. Smith in which he found a large gap between DNR's 0.75 acres in VMS 14-178 and Srofe's property. Additionally, the description of the 0.75 acres is rectangular, which does not match the boundary line agreement. Finally, the description of the 0.75 acres indicates it is located on the west side of the road, while Srofe's property is on the east side of the road.

{¶29} Srofe next argues that the trial court erred in vacating the 2019 judgment entry in which Srofe was granted ownership of approximately 12 acres. The 2019 judgment was final and DNR should have filed a motion to join Srofe's prior proceedings, but did not. And Srofe could not have reasonably known to add DNR as a party in his prior complaint.

{¶30} Finally, Srofe attacks the credibility of the state's surveyor expert maintaining that Smith was biased and his opinion was subjective. According to Srofe, Smith failed to follow the survey standards and focused on interpreting the deeds and boundary line agreement to conform with DNR's claim of ownership of the approximate 12 acres. Thus, the trial court failed to properly evaluate the credibility of DNR's expert and it was against the manifest weight of the evidence to rely on the boundary line agreement. Srofe concludes by asserting that DNR failed to demonstrate ownership of the adjoining property north of Srofe's.

{¶31} DNR in response maintains that the standard of review is manifest weight as Srofe is challenging the trial court's factual findings. DNR additionally argues that it was Srofe's expert who failed to follow the proper survey standards in which he ran boundary lines that had no bearing to the boundary line

agreement, ignored calls to adjoining properties, determined the 0.75 acres owned by DNR as five sided when the description is that it is rectangular, and used priority calls of concrete markers that were not labeled. DNR contends that the trial court did not err in its thorough analysis and aligned Srofe's 1.2 acres with the boundary line agreement and the prior transfers that demonstrated Wagner did not maintain any residual property north of Srofe's property. The trial court's conclusion according to DNR is supported by DNR's Exhibits G, L and N.

{¶32} In response to Srofe's claim that res judicata applies, DNR notes that Srofe conceded the 2019 judgment erroneously granted him ownership to VMS 13-521, which belongs to DNR. Thus, making the judgment void. Moreover, the trial court did not have to rely on Civ.R. 60(B) to vacate the 2019 judgment, but rather, it vacated the judgment as part of the trial court's inherent power to vacate void judgments. Finally, res judicata is inapplicable since DNR was not a party to the previous litigation. Srofe did not serve DNR with notice of his complaint even though he was aware of the boundary line agreement that was binding on his property. Therefore, DNR requests that we affirm the trial court's decision and find the boundary line agreement valid, which does not require supporting documentation.

{¶33} Srofe maintains that the standard of review is de novo but even if we consider the issue under the manifest weight of the evidence standard, reversal is still warranted. DNR failed to present documentation that established its ownership of the remainder of VMS 14-178; rather, DNR's claims are based on illogical assumptions. Srofe next argues that DNR utilized the wrong legal

mechanism to attack the prior judgment granting Srofe ownership of the approximate 12 acres. According to Srofe, DNR should have filed a Civ.R. 60(B) motion to vacate the 2019 judgment, which is the sole mechanism that is legally permissive. Srofe reiterates that DNR failed to file a motion to intervene,[2] motion to reopen or motion to vacate the prior legal proceedings. Moreover, Srofe contends res judicata applies as he named all Jane Does and John Does and their successors and devisees in his prior litigation, and served them by publication. Srofe then attacks the trial court's order to vacate the 2019 judgment as vague since the trial court does not clarify if the default judgment was void, voidable, or otherwise.

I. STANDARD OF REVIEW

{¶34} Quiet title rulings are reviewed under a manifest weight of the evidence standard. *Holiday Haven Members Assn. v. Paulson*, 4th Dist. Hocking No. 13CA13, 2014-Ohio-3902, ¶ 22. "When evaluating whether a judgment is against the manifest weight of the evidence in a civil case, the standard of review is the same as in the criminal context." *Ford v. West*, 12th Dist. Fayette No. CA2017-11-025, 2018-Ohio-2626, ¶ 9. Thus, in determining here whether the trial court's decision was against the manifest weight of the evidence, we will review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether in resolving conflicts

[2] DNR during oral argument requested that we decline to address Srofe's argument that DNR should have intervened in the prior litigation as Srofe presented this argument for the first time in his reply brief. We agree with DNR and accordingly, "we will not address an argument made for the first time on appeal in a reply brief." *Bender v. Portsmouth*, 4th Dist. Scioto No. 12CA3491, 2013-Ohio-2023, 2013 WL 2152511 * 1.

in the evidence, the trier of fact lost its way and created such a manifest miscarriage of justice that the judgment must be reversed. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), citing *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶35} "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Const. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus.

> Circumstantial evidence and direct evidence inherently possess the same probative value and therefore should be subjected to the same standard of proof.

State v. Jenks, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph one of the syllabus.

{¶36} "[A]ppellate courts recognize that issues of evidence weight and witness credibility are matters for the trier of fact to determine, as long as a rational basis exists in the record for its decision." *State v. Greeno*, 4th Dist. Pickaway No. 19CA15, 2021-Ohio-1372, ¶ 15. The trier of fact "is free to believe all, part or none of the testimony of any witness," and we "defer to the trier of fact on these evidentiary weight and credibility issues because it is in the best position to gauge the witnesses' demeanor, gestures, and voice inflections, and to use these observations to weigh their credibility." *State v. Dillard*, 4th Dist. Meigs No. 13CA9, 2014-Ohio-4974, ¶ 28, citing *State v. West*, 4th Dist. Scioto No. 12CA3507, 2014-Ohio-1941, ¶ 23.

{¶37} "Reversal on the manifest weight of the evidence and remand for a new trial are not to be taken lightly." *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 31.

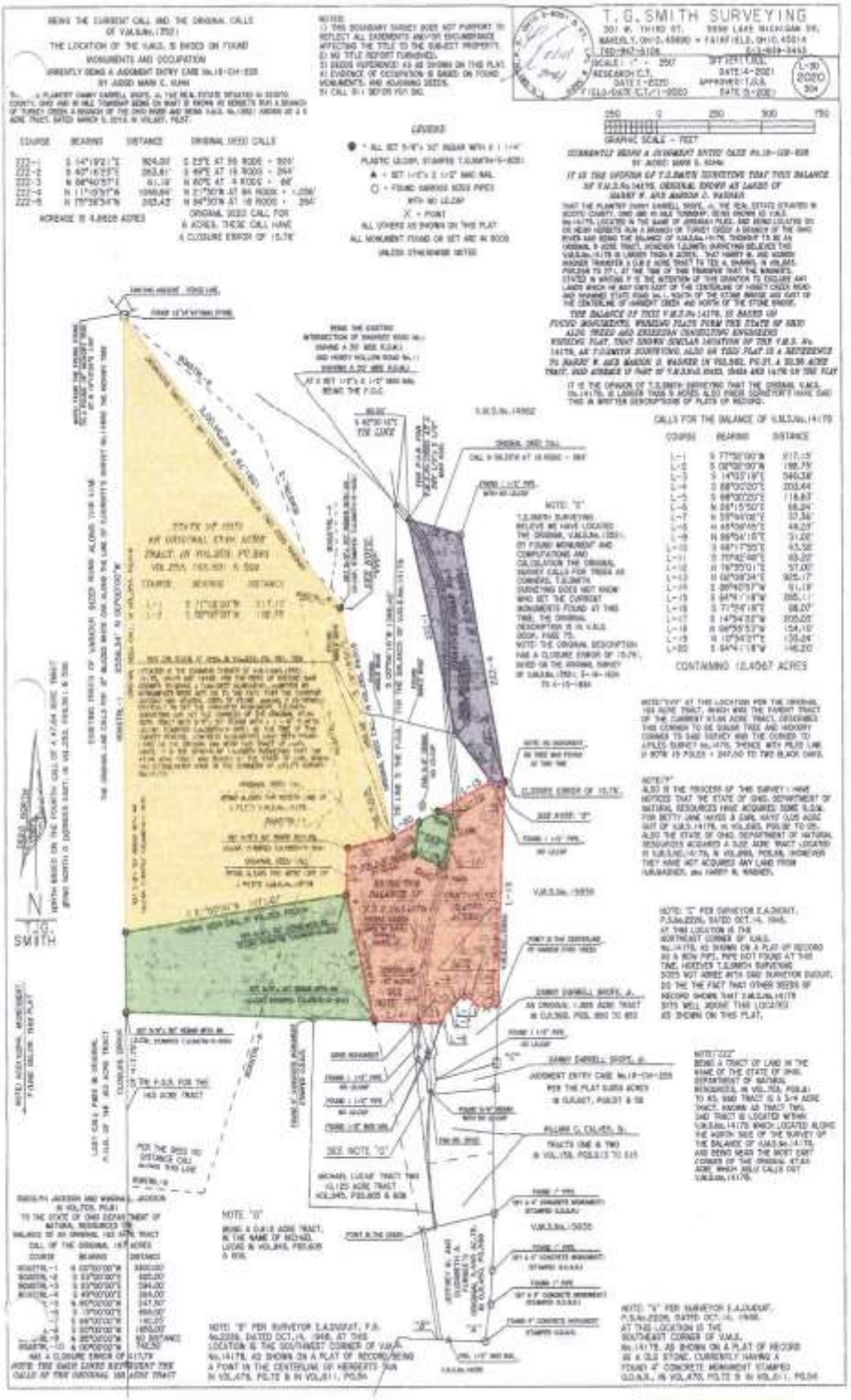
A. Expert Testimony

{¶38} In the case at bar, each party submitted the testimony of a survey expert in support of their corresponding position. As the trier of fact, the trial court was in the best position to observe each expert and determine whether to accept all, part or none of their respective testimony. Srofe maintains that the trial court erred in its credibility determination and in finding DNR's expert opinion credible and relying on it. We disagree.

{¶39} Our review of Srofe's expert's testimony reveals several inconsistencies that bring into question his finding that DNR does not own property bordering north of Srofe's property. T.G. Smith was hired by Srofe and was paid for his services. And based on Srofe's testimony, T.G. Smith's research and final conclusion was based on a continuous collaboration with Srofe, in which several drafts of the survey were exchanged between them. What is more, T.G. Smith testified that although he did not find monuments as described in the deeds, he nonetheless, considered one-and-a-half-inch pipe with no identification cap as a monument. T.G. Smith testified that the 47-acre tract of land's "original survey of that tract doesn't call for a concrete monument. It doesn't call for a pipe. But in my business, we take the best found evidence available." However, "in determining boundaries, natural and permanent monuments are the most satisfactory evidence and control all other means of

description, in the absence of which the following calls are resorted to, and generally in the order stated: First, natural boundaries; second, artificial marks; third, adjacent boundaries; fourth, course and distance * * *." *Broadsword v. Kauer*, 161 Ohio St. 524, 534, 120 N.E.2d 111 (1954).

{¶40} T.G. Smith's survey map, as color modified by Smith, was admitted as DNR's Exhibit D:


T. G. SMITH SURVEYING
CALLS FOR THE BALANCE OF V.M.S.No.14178
CONTAINING 12.4067 ACRES
STATE'S EXHIBIT D

{¶41} In the matter at bar, there were no natural boundaries, and even by T.G. Smith's testimony, there were no permanent monuments since none of the concrete bars were placed in the ground. Rather, they were on top of the ground and not labeled. Thus, the third best found evidence is adjacent boundaries. This was what Bryan Smith did in his research of the issue. Smith relied on the boundary line agreements of the surrounding properties that are near Srofe's property. The agreements demonstrate adjoining tracts of land. Smith also went back to the 1948 warranty deed in which Henry Wagner and Marion Wagner acquired VMS 13-521 and VMS 14-178. And then in 1950, Henry and Marion Wagner acquired additional property from Jay and Mamie Hicks in which both VMS 13-521 and VMS 14-178 are referenced. What is more, Smith testified that when looking at adjoining calls, this deed contained adjoining calls and there should not be a gap. But according to T.G. Smith, there is a 400-foot gap. Smith's survey map was admitted as DNR's Exhibit C2:


PLAT OF SURVEY
Shawnee State Forest
Part of Virginia Military Survey Numbers 13521, 14178, 15423&15424
State Forestry Road 1, Along Harber Fork Creek
Nile Township, Scioto County, Ohio
State's Ex. C2

{¶42} As demonstrated below, the admitted exhibits support the trial court's reliance on the boundary line agreement, Smith's testimony, and several of DNR's exhibits. Accordingly, the trial court as trier of fact did not lose its way in finding DNR's expert testimony credible.

B. Boundary Line Agreement and Deeds

{¶43} "The construction of written contracts and instruments, including deeds, is a matter of law." *Long Beach Assn., Inc. v. Jones*, 82 Ohio St.3d 574, 576, 697 N.E.2d 208 (1998). And "[q]uestions of law are reviewed *de novo*." (Emphasis sic.) *Id*. Under a de novo review, an appellate court may interpret the language of the contract substituting its interpretation for that of the trial court. *Krantz v. Pahnke*, 5th Dist. Richland No. 2021 CA 0043, 2022-Ohio-15, ¶ 42, *cause dismissed*, 166 Ohio St.3d 1406, 2022-Ohio-512, 181 N.E.3d 1194, citing *Children's Medical Center v. Ward*, 87 Ohio App.3d 504, 622 N.E.2d 692 (2nd Dist.1993).

{¶44} R.C. 5301.21 states:

> When the owners of adjoining tracts of land, or of lots in a municipal corporation, agree upon the site of a corner or line common to such tracts or lots, in a written instrument containing a pertinent description thereof, either with or without a plat, executed, acknowledged, and recorded as are deeds, such corner or line thenceforth shall be established as between the parties to such agreement, and all persons subsequently deriving title from them.
>
> Such agreement shall be recorded by the county recorder in the official records. The original agreement, after being so recorded, or a certified copy thereof from the record, is competent evidence in any court in this state against a party thereto, or person in privity with a party.

{¶45} On September 19, 1978, Hayes, Srofe's property predecessor, signed the boundary line agreement with DNR, which was recorded on March 19,

1979, and incorporated in Srofe's deed. Srofe did not object to the admission of the boundary line agreement as an exhibit. The agreement admitted as DNR's Exhibit C13 states as follows:

> Whereas, Betty J. Hayes is the owner in fee simple of land as described in Deed Book 600, Page 508 of the Deed Records of Scioto County, State of Ohio;
>
> And Whereas, the State is owner in fee simple of a tract of land adjoining the Betty J. Hayes' land;
>
> And Whereas, the location of the boundary between Betty J. Hayes and the State is uncertain, and the parties hereto desire to fix said boundary and to make its location certain as provided by Section 5301.21 of the Ohio Revised, Code;
>
> And Whereas, the parties hereto have agreed upon and fixed the site of a line common to their tracts and desire to enter in a written contract evidencing their agreement;
>
> Now Therefore, the parties do hereby mutually agree upon and fix the following description as the site of the line common to their respective tracts, and mutually assert that the same accurately delineates the boundary to which Betty J. Hayes and the State have agreed, to wit:
>
> See attached Exhibit "A" Description
>
> See attached Exhibit "B" Plat.
>
> Said line is hereby affixed and established as between the parties hereto, Betty J. Hayes and the States, and all persons subsequently deriving title from them.
>
> It is further agreed and covenanted between the parties that this agreement and a copy of the plat of this agreement shall be recorded as provided by law by the recorder of Scioto County, Ohio. Said agreement and plat shall then be filed with the Auditor of State along with the evidence of title to the land affected.

{¶46} Exhibit A in the boundary line agreement states:

> Situated in Nile Township Scioto County, State of Ohio and beginning at an iron pipe at the Southeast corner of a tract of land described in deed volume 600, page 508 Scioto County deed records, said iron pipe being the True Point of Beginning of this boundary line agreement description; thence North 18°21'55" East a distance of 241.50 feet to a point in the centerline of a branch to Harbert Fork Creek; thence with said centerline the following 6 courses and distances:
>
> 1. North 87°11'38" West a distance of 57.00 feet to an iron pipe;
> 2. North 54°29'28" West a distance of 63.22 feet to a point;

3. North 30°04’23” West a distance of 43.38 feet to a point;
4. North 74°42’23” West a distance of 31.02 feet to a point;
5. South 61°22’06” West a distance of 48.23 feet to a point;
6. South 71°57’23” West a distance of 37.36 feet to a point at the intersection of said centerline and the centerline of Harbor Fork Creek; thence with the centerline of said creek South 42°42’50” West a distance of 111.63 feet to a point; thence continuing with said centerline South 36°55’27” West a distance of 43.35 feet to an iron pipe on the East right-of-way of Shawnee State Forest Road No. 1, said iron pipe being the Termination of this line description.

The afore described line was surveyed by William G. McQueen, registered surveyor No. 4347 in June, 1978.

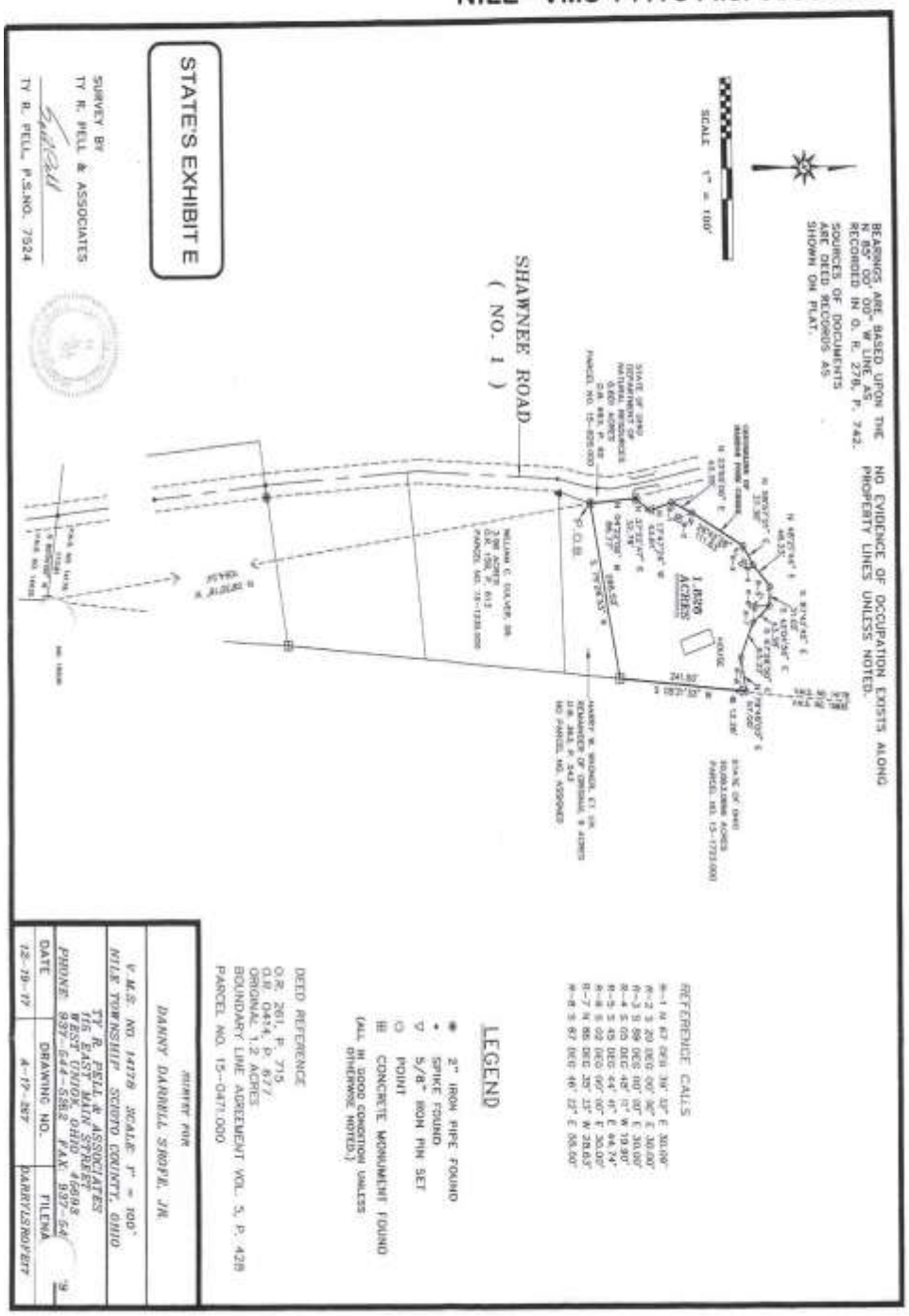
{¶47} And the diagram attached to the boundary line agreement is as follows:

PLAT OF
BOUNDARY LINE
AGREEMENT
BETWEEN
BETTY J. HAYES
A.D.
THE STATE OF OHIO
AND THE BOARD OF COUNTY
OHIO
Scale 1" = 100'
Hayes
State of Ohio
EXHIBIT "B"
VOL 5 PAGE 428

{¶48} In reviewing the boundary line agreement as written, we find that it was entered into between DNR and Hayes because they have an "adjoining" tract of land with a boundary line that is "uncertain." And the direction of the first four boundary line points that begin at the southeast point go northwest. So, the adjoining tract of land is towards the north of Hayes property, currently owned by Srofe. Another observation we note is the date of the agreement. Hayes signed the agreement in September 1978, and DNR signed it in November 1978, with the document being recorded on March 19, 1979. This agreement was entered into just months after DNR acquired VMS 13-521 on April 13, 1978, and the two tracks from Jacksons, the 32.36 acres and 0.75 acres, on February 21, 1978.

{¶49} Moreover, Ty Pell's survey completed on behalf of Srofe on December 19, 2017, and relied on by Srofe in his previous 2018 proceedings, acknowledges the boundary line agreement and has the same northern boundary outline of Srofe's property as the boundary line agreement. Ty Pell's survey map was admitted as DNR's Exhibit E:

NILE - VMS 14178 File: 00000546



{¶50} Accordingly, we conclude that DNR and Srofe have an adjoining boundary line that begins at the southeast point and goes northwest based on the boundary line agreement.

{¶51} Our conclusion is further supported by the older warranty deed of November 18, 1950, in which Jay Hicks and his wife Mamie Hicks sold to Henry W. Wagner and Marion D. Wagner their remaining 32.36 acres and specifically noting that the exception is the "47.64 acres transferred by Jay Hicks to the State of Ohio." The description of the property references both VMS 13-521 and 14-178. And the tracing-tract map dated March 1, 1954, that was admitted as Srofe's Exhibit 3, shows VMS 14-178 to the south of VMS 13-521 with the southwest corner of VMS 13-521 connecting to VMS 14-178, and then also VMS 14-178 borders the south and southeast part of the 47.64-acre tract of land. And the 32.36-acre property being to the west of VMS 14-178 and south of the property with 47.64 acres. And this same description was included in the warranty deed dated February 21,1978, when Rudolph Jackson and Winona L. Jackson transferred the 32.36 to DNR. Therefore, all properties border each other as seen below.

Form No. A-4

OHIO DIVISION OF FORESTRY

TRACING-TRACT MAP

Name of Owner JAY & MAYME HICKS Tract No.

Purchase Unit SHAWNEE County SCIOTO Township MILLE

Acres in Tract 47.64 Source SCIOTO Co. TAX MAP

Traced by: AVMAN Scale Date 3/1/54

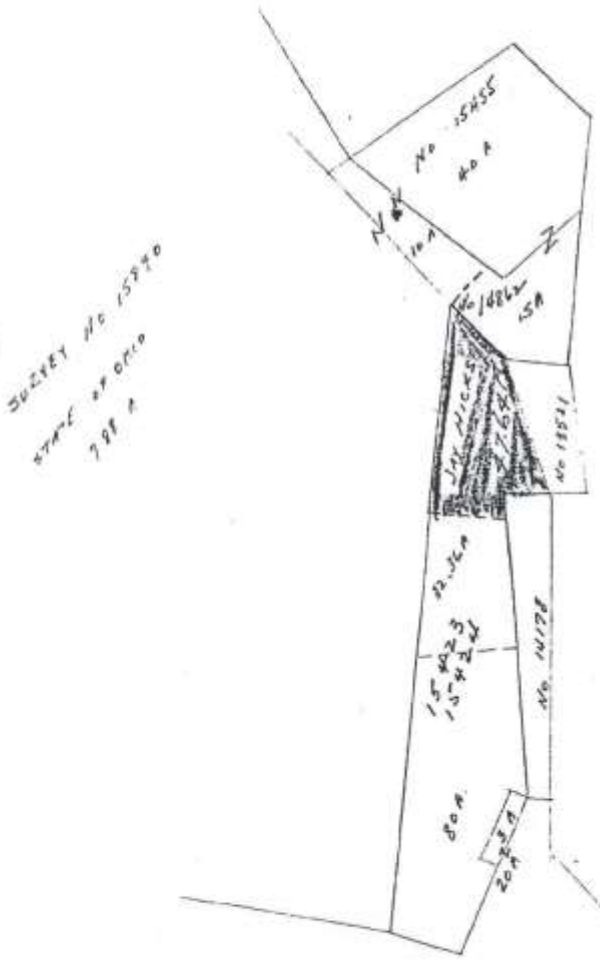


EXHIBIT 3

{¶52} And then there is Exhibit L, a warranty deed in which Henry Wagner sold the remainder of VMS 14-178, specified as nine acres, to Shanks. Smith explained the importance of this deed which includes detailed measurements of the property. As interpreted by Smith, this deed tells us that the Wagners intended to sell all of their interest north and west of the Harbor Fork Creek, which forms the north and west boundary of Srofe's 1.2-acre tract, thus, leaving no gaps. And then Shanks sold to Adams who sold to DNR.

{¶53} The boundary line agreement and admitted deeds demonstrate DNR owned property north of Srofe's property and had an adjoining boundary that required the execution of the boundary line agreement back in 1978. Wherefore, we affirm the trial court's decision.

C. Res Judicata

{¶54} "Res judicata ensures the finality of decisions." *Brown v. Felsen*, 442 U.S. 127, 131, 99 S.Ct. 2205, 60 L.Ed.2d 767 (1979). "It bars a party from relitigating the same issue or claim that has already been decided in a final, appealable order or a valid, final judgment in a prior proceeding and could have been raised on appeal in that prior proceeding." *AJZ's Hauling, L.L.C. v. TruNorth Warranty Programs of North America*, __ S.Ct. __, 2023-Ohio-3097, __ N.E.3d __, ¶ 15. The Supreme Court of Ohio adopted the "the modern application of the doctrine of res judicata, which includes claim preclusion and issue preclusion." *Id*. at ¶ 16.

> "Claim preclusion makes ' "an existing final judgment or decree between the parties to litigation * * * conclusive as to all claims which were or might have been litigated in a first lawsuit." ' " *Lycan v. Cleveland*, __ Ohio St.3d __, 2022-Ohio4676, __ N.E.3d

> __, ¶ 22, quoting *Natl. Amusements, Inc*. at 62, quoting *Rogers v. Whitehall*, 25 Ohio St.3d 67, 69, 494 N.E.2d 1387 (1986).
>
> For claim preclusion to apply, the following four elements must be satisfied: "(1) [A] prior final, valid decision on the merits by a court of competent jurisdiction; (2) a second action involving the same parties, or their privies, as the first; (3) a second action raising claims that were or could have been litigated in the first action; and (4) a second action arising out of the transaction or occurrence that was the subject matter of the previous action."

Id.

{¶55} "Issue preclusion, also known as collateral estoppel, prevents parties from relitigating facts and issues in a subsequent suit that were fully litigated in a prior suit." *Id.*, citing *Thompson v. Wing*, 70 Ohio St.3d 176, 183, 637 N.E.2d 917 (1994).

> Issue preclusion applies "when the fact or issue (1) was actually and directly litigated in the prior action [and] (2) was passed upon and determined by a court of competent jurisdiction[ ] and (3) when the party against whom collateral estoppel is asserted was a party in privity with the party to the prior action." *Thompson* at 183.

Id.

{¶56} An appellate court reviews de novo the question whether res judicata applies to a claim or issue. *See AJZ's Hauling, L.L.C.*, 2023-Ohio-3097, ¶ 16. Moreover,

> res judicata is not to be so rigidly applied "when fairness and justice would not support it." *State ex rel. Estate of Miles v. Piketon*, 121 Ohio St.3d 231, 2009-Ohio-786, 903 N.E.2d 311, ¶ 30, citing *Davis v. Wal-Mart Stores, Inc*., 93 Ohio St.3d 488, 491, 756 N.E.2d 657 (2001) (res judicata is not to be so rigidly applied as to defeat the ends of justice or to create an injustice) and *Lucas v. Porter*, 2008 ND 160, 755 N.W.2d 88, ¶ 22 ("Fundamental fairness underlies the determination of privity")[.]

Id. at ¶ 18.

{¶57} We decline to apply res judicata so rigidly in this case considering the lack of due process that occurred in Srofe's 2018 litigation. As we have previously outlined,

> Although "due process" lacks precise definition, courts have long held that due process requires both notice and an opportunity to be heard. *In re Thompkins*, 115 Ohio St.3d 409, 2007-Ohio-5238, 875 N.E.2d 582, ¶ 12, citing *Hagar v. Reclamation Dist. No. 108*, 111 U.S. 701, 708, 4 S.Ct. 663, 28 L.Ed. 569 (1884); *Caldwell v. Carthage*, 49 Ohio St. 334, 348, 31 N.E. 602 (1892). "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950); *accord In re Thompkins* at ¶ 13.

Matter of F.T., 4th Dist. Ross No. 22CA17, 2023-Ohio-191, ¶ 38.

{¶58} Further,

> " '[A] judgment rendered without proper service or entry of appearance is a nullity and void.' " *State ex rel. Ballard v. O'Donnell*, 50 Ohio St.3d 182, 183-184, 553 N.E.2d 650 (1990), quoting *Lincoln Tavern, Inc. v. Snader*, 165 Ohio St. 61, 64, 133 N.E.2d 606 (1956). Thus, "a valid court judgment requires both proper service under the applicable Ohio rules and adequate notice under the Due Process Clause." *In re A.G.*, 4th Dist. Athens No. 14CA28, 2014-Ohio-5014, 2014 WL 5812193, ¶ 14, citing *Samson Sales, Inc. v. Honeywell, Inc.*, 66 Ohio St.2d 290, 293, 421 N.E.2d 522 (1981).

Id. at ¶ 38.

{¶59} The United States Supreme Court made clear that "Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable." (Emphasis sic.) *Mennonite*

Bd. of Missions v. Adams, 462 U.S. 791, 800, 103 S. Ct. 2706, 77 L. Ed. 2d 180 (1983). The Supreme Court of Ohio similarly held that "notice by publication to a person with a property interest in a proceeding is insufficient when that person's address is known or easily ascertainable." *Cent. Tr. Co. v. Jensen*, 67 Ohio St. 3d 140, 141, 1993-Ohio-232, 616 N.E.2d 873.

{¶60} "The authority to vacate a void judgment is not derived from Civ.R. 60(B) but rather constitutes an inherent power possessed by Ohio courts." *Patton v. Diemer*, 35 Ohio St.3d 68, 518 N.E.2d 941 (1988), paragraph four of the syllabus. Moreover, "A court has an inherent power to vacate a void judgment because such an order simply recognizes the fact that the judgment was always a nullity." *Van DeRyt v. Van DeRyt*, 6 Ohio St.2d 31, 36, 215 N.E.2d 698 (1966).

{¶61} In the matter at bar, Srofe knowing that his property borders DNR and that his deed includes language that he is bound by a boundary line agreement, failed to name DNR as a party in his quiet title and adverse possession complaint. Further, Srofe failed to serve DNR with a copy of the complaint when Srofe was well aware of DNR's office location. Srofe has had several conversations with the manager Egbert and his staff, and he also visited DNR's forest division headquarters. The failure to serve DNR with the complaint in a proceeding that adversely affected DNR's property interest makes the 2019 judgment entry a nullity.

{¶62} Additionally, Srofe included in his complaint VMS 13-521, which he knew was property owned by DNR. Srofe admitted to this error at trial and made

it clear that he had no intention to acquire any of DNR's property. Thus, with the improper inclusion of VMS 13-521 in the 2019 judgment, the judgment is a nullity. Accordingly, the 2019 judgment entry granting Srofe ownership of property owned by DNR was void, and the trial court had the inherent power to vacate the void entry.

CONCLUSION

{¶63} We affirm the trial court's decision finding DNR the owner of property that borders Srofe's 1.2 acres. There was competent credible evidence, including the boundary line agreement that was admitted without objection, to support DNR's assertions.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Smith, P.J. and Hess, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Kristy S. Wilkin, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.